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Original Paper

Bureaucracy in the Service of Law: Holding Chinese Controlling Shareholders Accountable

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Abstract

Common law style fiduciary duty has existed in Chinese Company Law as a statutory matter since 2006 and, by at least one account, far longer in practice. But most of the literature has pronounced it a failure, or, at best, a slowly developing doctrine. All of this literature deals with fiduciary duty in privately-held companies, because that is where virtually all of the cases take place. Yet proposed amendments to the China Company Law double down on fiduciary duty.

Company Law also provides for controlling shareholder liability, but cases are few and far between, and virtually non-existent in listed State-Owned Enterprises.

How can fiduciary duty be adapted to Chinese institutions in order for it to succeed? My research finds that recent judicial enforcement of fiduciary duty is quite healthy in privately-held companies, at least in Shanghai. Although doctrinal analysis is almost non-existent, Shanghai judges know a fiduciary breach when they see one and possess the statutory means to redress it.

Matters are also well when it comes to holding controlling shareholders accountable in privately-held companies. Although the controlling shareholder statute is rarely used, it is the case that virtually all of the defendants in fiduciary duty cases – directors, officers, and senior managers – are almost always shareholders in these companies, if not controlling shareholders, so the effect of liability, disgorgement, and damages is largely the same as if they had been sued as shareholders.

The real problem is the virtually non-existent legal accountability of controlling shareholders in mixed ownership enterprises and especially listed SOEs. The problem is institutional. This article proposes a way to situate fiduciary enforcement within the appropriate and suitable Chinese bureaucratic tradition rather than to continue to try to force adjudicative methods where they have failed and will continue to fail because of structural, political, and cultural impediments, thus creating a uniquely Chinese way of controlling shareholder fiduciary enforcement.

China's adoption of a statutory version of common-law style fiduciary duty is well-known and is also a well-known challenge in the operation of its corporate governance system. Scholars have long noted the twin problems of inadequate interpretation and inadequate enforcement. (Note 1) On the interpretation side, the Anglo-American fiduciary duty from which the Chinese law is adopted is a broad principle that has received definition and scope from centuries of interpretation and, in some cases, codification incorporating that history. (Note 2) This is a natural consequence of the common law practice of reason and discovery and reliance upon judicial precedent to build a reasonably consistent body of law, which then goes deep to establish norms to regulate behavior. (Note 3) China's civil law system does not engage in this practice. Rather, judges are more or less on their own in rigidly applying statutes (which themselves are often quite broad and ambiguous) without the power to interpret the statute in a manner that might be considered expansive and without the opportunity to rely on a developed body of reasoned interpretation. Compounding this is the fact that the skills and abilities of the Chinese judiciary are still developing and may not be adequate to the task at hand. (Note 4) This is particularly problematic when the statute says nothing more than that "(directors, officers, and supervisors) shall bear the obligations of fidelity and diligence to the company," (Note 5) a phrase that cries out for interpretation.

Chinese company law also imposes fiduciary-like duties on controlling shareholders. Article 21 states: "Neither the controlling shareholder, nor the actual controller, nor any of the directors, supervisors or senior management of the company may injure the interests of the company by taking advantage of its connection relationship. Anyone who causes any loss to the company due to violating the preceding paragraph shall be liable for the compensation".

The ambiguity of this provision notwithstanding, it is important to note that it applies to both the controlling shareholder (Note 6) and the "actual controller." (Note 7) As is widely known by now, the Chinese Communist Party (CCP) has the primary role in the governance of Mixed Ownership Enterprises ("MOEs") and increasingly so in private companies, such that ownership control is an unreliable proxy for actual control. (Note 8) On the face of it then, the legislation is designed to ensure that whoever actually controls the company can be held accountable, although it does not specify to whom, simply reciting that "[a]nyone who causes any loss to the company due to violating the preceding paragraph shall be liable for the compensation."

As a statutory matter then, and leaving aside the vagueness and ambiguity that generally characterizes Chinese legislation, the most significant components of fiduciary duty are covered. But scholars have observed that this has come to little. According to the most recent scholarship, fiduciary duty cases have historically been few, the derivative suit mechanism is rarely applied, and remedies most frequently consist of injunctive relief. (Note 9) Virtually every fiduciary duty suit has been brought against unlisted companies, yet MOEs have a significant role in the economy and Xi Jin Ping has continued to emphasize the importance of state ownership and party control, (Note 10) leaving the internal fiduciaries and controlling shareholders of approximately 30% of China's economy functionally unaccountable to their outside shareholders. (Note 11)

But recent developments have provided room for hope, at least with respect to private companies. My own research has revealed a recent surge of cases in the Shanghai courts citing (but not analyzing) China's duty of loyalty, and a survey of these cases shows that courts have no problem imposing damages and disgorgement in appropriate cases.

The matter is different with respect to listed MOES. Of the 50 cases surveyed, not one involved a listed company. This is notable because China has long depended on, and is likely to continue to rely significantly on investment by foreigners who are accustomed to and expect meaningful legal shareholder protections. So while adequate protections even for foreign investors might exist in the unlisted sector, the story is different for investors in the public sector. This is as true of direct controllong shareholder liability as it is of board and officer-level liability.

One might reasonably conclude that the Party-State is primarily using Anglo-American fiduciary duty simply for show, to entice foreign investors to put their money in Chinese corporations by using the attractive bells and whistles of American-style corporate governance, although I tend to think that even a translucent market is not that easily fooled. (Note 12) One might instead think that, after years of relative failure, China might step back and reevaluate the way it articulates and enforces the duties of inside fiduciaries and controlling shareholders.

I have previously suggested that boards of directors as an institution are out-of-place in Chinese companies because of the nation's culture and politics, at least with respect to SOEs and partially-listed SOEs (Note 13) (and, indeed, boards are relatively powerless in MOEs and increasingly constrained by political demands in private companies.) (Note 14) I have also written that fiduciary duty itself (a dispassionate, objective, doctrine) is neither culturally appropriate nor likely to succeed, at least in its prophylactic dimensions, in a society heavily reliant on *guanxi* (a personal, subjective practice) and in a governing structure in which the Party-State seems to be inextricable (making the dispassionate application of objective rules difficult if not impossible). (Note 15) The thrust of these papers is to encourage China to develop indigenous, culturally, and politically more appropriate, and thus more effective, forms and regulations of ways of doing business. This paper continues that project. (Note 16)

China has doubled-down on fiduciary duty. (Note 17) The 2021 Draft Revisions to the Company Law imposing duties on shareholders to other shareholders, codifying corporate opportunity doctrine and related party transactions in a manner that resembles standard American law, and generalizing and broadening the powers of the board and general manager all, among other revisions, lead to this conclusion and continue an expansion that began with the 2005 Company Law (effective 2006). (Note 18) While these provisions are not denominated "fiduciary" in the statute, they would be so considered, or at least considered to be within the broad concept of fiduciary duty, in the Anglo-American context. Moreover, the existing 2005 Company Law already establishes director liability for damaging the company and shareholders in various ways that, in a common law context, would be likely to fall within the fiduciary rubric, and the aforementioned categories of "loyalty and diligence" serve as a catch-all to this list. Finally, the amendments appear to go a long way towards transforming Chinese company law from mandatory to enabling, in this respect again following the broad American model. The greater latitude provided to management (and controlling shareholders) in structuring their governance arrangements leads to the conclusion that greater monitoring of these actors is important. (Note 19)

It is reasonable to conclude, then, that fiduciary duty and its penumbrae are here to stay in China. But this will be of no account in the long-term if they are not meaningfully interpreted and cannot be enforced in an important context. Enforcement is virtually non-existent in listed MOEs. Chinese Company Law provides many prohibitions and obligations but few mechanisms for enforcement. Derivative suits are available, but without a developed plaintiff's bar incentivized by contingency fees (which are permissible but not often used, which makes sense when substantial damages awards typically are rare), (Note 20) and a one percent cumulative stockholding threshold as the price of entry to a derivative suit, there is nobody to enforce these duties. Class actions are particularly problematic in a state that fears the formation of non-Party group power and in which defendants are likely to be "powerful political actors." (Note 21) It is perhaps no wonder that virtually all Chinese fiduciary litigation are disputes within what Americans would call close corporations. (Note 22)

Greater (but still deeply inadequate) success has been attained in the securities regulation regime (where a long-missing class action procedure is developing) but disclosure, not fiduciary duty, is the dominant principle in that context, even though fiduciary ideas have been articulated. (Note 23) Finally, other external forms of monitoring and enforcement, like the market for corporate control, appear to have thus far failed. (Note 24)

If fiduciary duty is in China to stay, if Chinese company law truly means to take internal monitoring seriously, if China really wants effective corporate governance and hopes to use it to sustain continued foreign investment, it requires effective means of interpreting and enforcing this duty. Success will come, however, only if these are developed in a manner that suits Chinese law, politics, and culture, the very dimensions of Chinese society that have retarded fiduciary duty's development. I thus argue here, as I have elsewhere, that effective corporate governance in China requires both form and substance that fits China, as American-style corporate governance clearly does not.

The problem of enforcing these duties has received significant attention in the literature. But scholars almost always try to resolve them within a private law framework. The role of the Party-State even in private corporations makes clear, however, that what presents itself as private law is in practice public law. (Note 25) It is therefore necessary to take a public law perspective in order to craft a meaningful enforcement mechanism for fiduciary duties. (Note 26)

I propose an enforcement mechanism that is conceptually tailored to China's unique political and business environment. My principal focus is on MOEs, but what I suggest can apply with equal force to private companies. (Note 27) My proposal draws on the procedure used in American law to address a similar problem of fiduciary duties in quasi-public organizations in the absence of enforcement incentives and mechanisms. That is the enforcement of the fiduciary duties of directors of not-for-profit corporations. (Note 28) As I will discuss in Part III this idea, adapted to an indigenous bureaucratic framework, might well provide an effective solution.

Part I surveys the literature on Chinese fiduciary duty and its enforcement problems, with particular attention to the problems of controlling shareholders.

Part II presents my updated research on the status of fiduciary duty in China and concludes that, while significant progress has been made with respect to private companies in the Shanghai courts, no progress has been made with respect to listed companies.

Part III is my proposal for the new bureaucracy and how it might work.

Part IV concludes.

1. Fiduciary Duty and Corporate Control

Although different states vary in its application, a statement of common law fiduciary duty is straightforward and direct. A fiduciary is to act in the best interests of her beneficiary. This doctrine was once strictly applied in the corporate context, prohibiting a director from receiving any benefit (including compensation) for his service on the board. As the principle came to be applied over time, exceptions were made, culminating in a set of doctrines, some now codified, that specify the conditions and terms that must be satisfied in order for a director to receive such benefits, all manifestations of the underlying notion that anything a director receives in any transaction with the corporation or its shareholders must be fair to the corporation or the minority shareholders. (Note 29) American corporate fiduciary duty is the result of more than 100 years of judicial development.

Any analysis of fiduciary duty in China (at least in English) must begin with the work of Professor Howson. His painstaking analysis reveals that a form of proto-fiduciary duty was developing even before the term was codified as the duty of loyalty (and now the "obligation of fidelity), (Note 30) along with a form of derivative litigation. (Note 31) His research studies the cases dealing with fiduciary duty and concludes that, despite the general skepticism surrounding the competence of Chinese judges and the indeterminacy of the statutes, Chinese judges have been slowly but successfully evolving a passably sophisticated understanding of fiduciary duty. Some of this may come from the historical growth of Chinese business forms from quasi-and quasi-family units where Chinese ideas and practices of filial obligation dominated, (Note 32) although it is worth noting that these family obligations generally ran from subordinate to superior rather than from power-holder to the vulnerable (as in Chinese political life obligations run from the individual to the state). Nonetheless, it is the clear duty of the superior to see to the well-being of the subordinate, as it is true in fiduciary relationships that the fiduciary must tend to the interests of the beneficiary.

Howson reviews the convergence literature, rehearsing the possible reasons for the formal statutory adoption of fiduciary duty in China, but attributes its rise – pre-formal adoption – as an almost natural consequence of the 1990s corporatization of the Chinese business sector, which transformed departments of the state into actual corporate entities. This gave rise to the need for some kinds of mechanisms to monitor corporate power-holders and restrain their opportunistic behavior. Thus, Howson's story is one of the organic development of legal restraints that grew alongside the introduction of new business forms in China. In this respect, a limited number of China's courts have functioned much like American common law courts in the development of fiduciary duty, albeit without the use of precedent or deference to a higher judicial authority. (Note 33)

Guangdong Xu and coauthors, writing several years after Howson, are less optimistic than Howson but still see some improvement in the judicial application of fiduciary duty, although more so in the work of the Chinese Securities Regulatory Commission (CSRC), with a more sophisticated understanding of fiduciary duty but largely working in the disclosure context. (Note 34) They identify conflicting provisions of the Company Law with respect to directors' duties and describe the statutory provisions as "overly simplistic, vague, and lack[ing] in workability." (Note 35) Particularly troubling to them is the vagueness of the law.

Their research reveals very few breach of fiduciary duty cases between 2006 and 2012, almost all of which involved the duty of loyalty, almost all of which involve various forms of self-dealing by directors, and all of which involved closely held corporations. Among the reasons they suggest for this paucity of litigation is the inflexibility of Chinese judges who prefer mechanical applications of the law, leading to a reluctance to accept cases that might require them to be more active in interpreting the law, and they cite other studies that support this conclusion. (Note 36) Despite this, they find some judicial capacity for innovative legal interpretation, using four cases as illustrations of this phenomenon, (Note 37) but note that each of these cases was brought before a court in an economically developed city, and thus reflects the abilities of the "high end" of the Chinese judiciary, not the norm. (Note 38)

With a somewhat better record, the CSRC also seems to fall quite short as an enforcement option. In the first place, the CSRC only has jurisdiction over listed companies, which, for my purposes focused on MOEs, is not a problem. More significant is that its broad mandate is disclosure. (Note 39) While tunneling by a controlling shareholder is unlikely to be properly disclosed, the scope of this legislative mandate clearly diminishes the scope and opportunities for enforcement of classical fiduciary duties. (Note 40) Moreover, the agency is under-resourced, personnel are poorly trained, and the agency is tied to the state and subject to political pressure. (Note 41) Finally, for my purposes, it is important to note that the CSRC has principally been concerned with duties of diligence, not duties of loyalty. (Note 42) Thus issues of self-dealing at both the directorial and controlling shareholder level are said to remain largely unaddressed.

Significant scholarly attention has been devoted to the duties of directors. Even if the content and enforcement of directorial fiduciary duties were crafted to perfection, however, there would still remain the reality that, at least in MOEs, the board itself is subject to the ultimate control of the party chairman and the internal corporate party infrastructure, which are beyond the reach of fiduciary duties. This suggests that the use of fiduciary duty as a mechanism of corporate accountability might be even more chimerical than its well-studied under-development and under-enforcement suggest. Fiduciary duty exists in Chinese law, and one must suppose that it is there to be used. But almost two decades of experience lead the literature to the reasonable conclusion that any meaningful use of the doctrine lies in the future.

Fiduciary duty as developed thus far, especially in Howson’s analysis, suggests the possibility that Chinese law might well eventually evolve to have some common law characteristics. (Note 43) But even if this were to happen and Chinese fiduciary duty did become an effective mechanism of internal corporate governance, it addresses only one dimension of China’s corporate accountability problems – that of vertical conflicts of interest. (Note 44) Perhaps far more important, and of far more difficult resolution, are horizontal conflicts of interest between controlling shareholders and minority shareholders in MOEs. Indeed Xu found no cases brought against controlling shareholders. (Note 45)

Any attempt to create a meaningful fiduciary enforcement regime in China must begin with the reality that Chinese corporations remain organs of the state. (Note 46) Wang’s extensive analysis details the parallel party structures within MOEs as well as the mechanisms of Party discipline that ensure that Chinese state-owned enterprises toe the Party line. It is important to note that my concern in this paper is distinct from the question of whether Chinese state-owned enterprises are profit-maximizing. They clearly are not, and presumably any outside investor in an SOE understands this. The issue of profit-maximization is clearly distinguishable from the question of whether the Party-State, as controlling shareholder, may illegitimately siphon assets and profits disproportionate to its shareholdings. The former simply is part of the rules of the game in China, which should be incorporated into share-pricing in a reasonably efficient market. The latter are violations of those rules, which presumably are illegal under Article 21 of the Company Law.

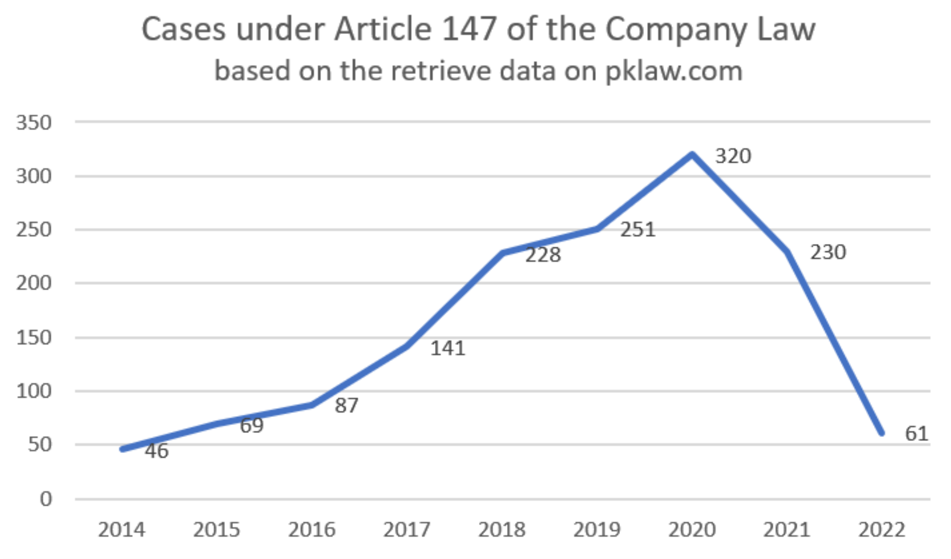
Most MOE top executives are Party members and are subject to Party rules, duties, and discipline, (Note 47) so even in the absence of an internal Party structure corporate governance should be expected to be highly sensitive and responsive to the needs of the Party. The same appears to be true with respect to private corporations as well, so that Milhaupt and Zheng consider ownership structure to be of limited significance in the actual conduct of Chinese corporate governance. They argue that focusing on ownership structure “deflects attention” from the much more important issue of “how to create an institutional environment more conducive to the growth and innovativeness of all firms in China, regardless of where they fall along the spectrum from state to private ownership. Thus they advocate shifting the state’s role away from that of an “active market participant” to “the designer and arbiter of neutral, transparent rules for market activity. This requires making the state accountable in its business relationships, as well as diminishing the power of the state in the economy. (Note 48) My proposal in this paper is designed to achieve at least a significant part of the first goal. The second goal is moot as the Party has recently stressed the importance of increasing its role in the economy.

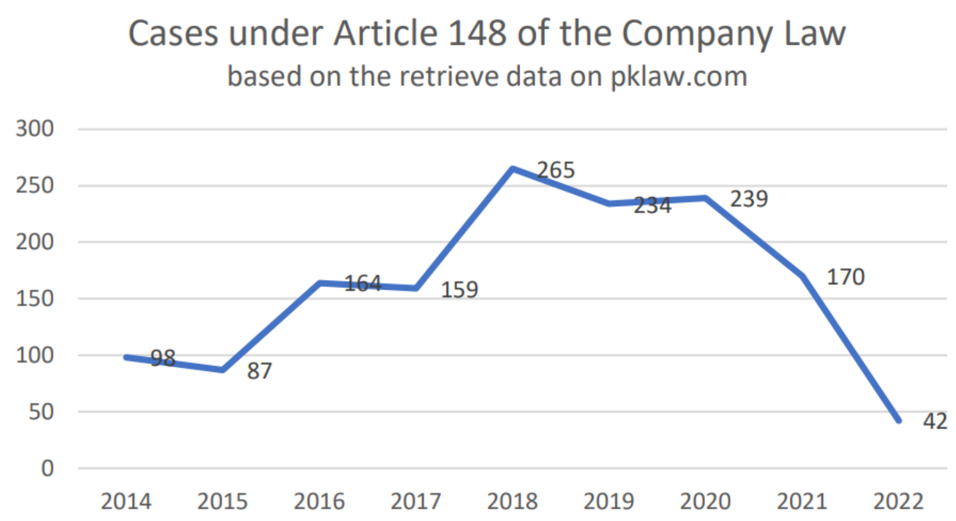
The structures of MOEs make them ripe for the picking by controlling shareholders. Public ownership exists in subsidiaries with the state taking its ownership through wholly SOE corporations, the exact structure warned against by James Bonbright and Gardiner Means in 1932 and which has historically proven to present significant fiduciary problems, no matter how efficient the structure. (Note 49)

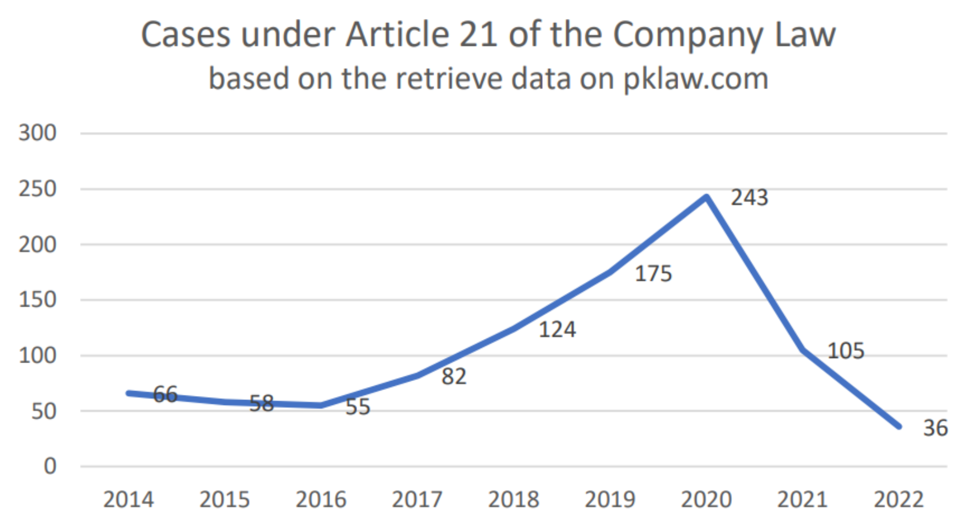
2. Fiduciary Duty Today: A Brief Survey of the Shanghai Courts

In order to assess the state of fiduciary duty today I have, following Howson, focused on the Shanghai courts as among the most sophisticated commercial courts in China. In light of previous scholarship and what I have previously written, the results were, on the one hand, surprising, and, on the other hand, quite predictable.

The surprising result is that, starting in 2014, there has been an explosion and rapid drop-off of cases relying at least in part on Article 147 (the duty of fidelity) in Shanghai. Starting with 46 cases in 2014, they climbed steadily to a peak of 320 cases in 2020, dropping suddenly to just over 61 cases in 2022. The same pattern appears for cases under Article 148 and Article 21, although Article 148 cases peaked earlier and had a slower decline as shown by the following graphs:







All of the cases involve private companies. (Note 50) Almost all of the cases involve misappropriation of corporate assets by a senior manager covered by Article 147, although a small handful of cases involve corporate opportunity and an even smaller number deal with violations of the duty of diligence. (Note 51) The reasons for this explosion are beyond the scope of this paper but will be the subject of future research. But they do provide an opportunity to study the application of fiduciary duty in a highly concentrated period.

The unsurprising finding is the virtual absence of any sort of fiduciary analysis. (Note 52) A typical opinion reviews the evidence, states the facts, and concludes:

"... the defendant . . . received the proceeds in violation of the duty of loyalty . . . . [I]n accordance with Article 147, Article 148 and Article 149 of the Company Law . . ." the defendant is therefore liable. (Not 53) There typically is no analysis or even explanation of the duty of loyalty. In this respect, two cases stand alone. In *Zhou Yu et al. v. Shi Tang Corporation Interest Liability Dispute*, the Shanghai First Intermediate People's Court explained the duty of fidelity in a manner that could have been lifted from an American treatise (and perhaps was):

"The so-called faithful obligation refers to the directors and senior management in managing the company, operating the business, and performing their duties, must work hard for the best interests of the company on behalf of all shareholders, maximize the protection of the interests of the company as the standard for the performance of their duties, and when their own interests conflict with the interests of the company, they must put the interests of the company first and must not pursue their own interests or the interests of the third party with whom they have an interest above the interests of the company". (Note 54)

Despite this unusually sophisticated explanation, the court nevertheless concludes by citing the statutory provisions without greater analysis beyond simple observation of the misappropriation, perhaps appropriate to civil law adjudication but unhelpful in the application of a common law principle. A similar statement appears in a duty of diligence case, *Shanghai Yachang Art Printing Co., Ltd. and Dai Hu, Civil Judgment of the Second Instance of the Dispute of Liability for Damaging the Company's Interests,* in which the court found no breach of duty. *(Note 55)*

So it is clear that at least some courts understand the broad principle of fiduciary duty, although legal analysis remains limited. One question that arises, though, is "who cares?" The Shanghai courts understand and apply fiduciary duty well enough. Despite the lack of legal analysis the courts engage in intense factual analysis, and cases do regularly find liability for the most common fiduciary violations. It is reasonable to conclude that this dimension of internal corporate governance may be well and even thriving, at least in private companies litigating in Shanghai courts, and that common law style fiduciary analysis simply is unnecessary. (Note 56)

One can also wonder about the importance of a broad duty of loyalty. Almost all of the cases that cite Article 147 also cite Article 148, which specifically prohibits almost all of the conduct that is covered by broad fiduciary duty, (Note 57) and the 2021 Draft Revisions provide American-like codification of related party transactions and corporate opportunity doctrine. (Note 58)

The problem lies with what is missing. These provisions apply only to "directors, supervisors, and senior management." In American fiduciary law, controlling shareholders – the common culprits in MOEs - are covered by the broad fiduciary principle. In China they are not. So while managers beholden to controlling shareholders under these provisions can be personally held liable, the controlling shareholder cannot be. Article 21 exists to prevent damage to the company by controlling shareholders, but the behavioral standard is unclear.

It is worth noting that such a behavioral standard can already be inferred from Chinese judicial enforcement of the duty of fidelity in unlisted companies. All of the adjudicated cases I have seen are cases nominally involving vertical conflicts of interest, as they must be given the scope of coverage of Articles 147 and 148 (and indeed, a number of cases turn on whether the defendant is in fact a member of "senior management."). But the reality is that these are not only vertical conflicts. Close examination shows that most the conflicts are in fact shareholder vs. shareholder, because all of the cases take place within closely-held corporations in which the vertical fiduciary is also a shareholder. The means of accomplishing the misappropriations exist by virtue of office, but the consequences are extra-normal returns to misbehaving shareholders, which is characteristic of American cases of close corporation shareholder oppression. (Note 59) Understanding the cases this way can lead to the development of a broad fiduciary understanding of Article 21.

The means for giving content to Article 21 thus exist in Chinese jurisprudence. Yet the courts have not developed such a principle. Why not simply rely on Articles 147 and 148 in the MOE context? Because while, in the listed company context, senior management will still be the vehicle for disproportionate distribution, they will not be the controlling shareholder and thus not the recipient of ill-gotten gains. The controlling shareholder thus must face direct liability. Why then is Article 21 so underdeveloped? A major reason could be lack of enforcement. There are several possible reasons for this as discussed in Part I, almost all of them leading to the conclusion that the political risks posed by challenging what is, in effect, Party governance of MOEs chills any enthusiasm for enforcement. If the problem is in fact political, the solution must be political as well.

3. A Public Law Solution to a Private Law Dilemma

Almost two decades after the formal introduction of fiduciary duty into Chinese law, with exceptionally slow application and evolution in legislative and judicial practice, it seems reasonable to conclude that the use of the doctrine to regulate vertical conflicts is on its way to success, at least in the most sophisticated courts. The fiduciary-like duty of controlling shareholders provided in Article 21 simply has been a non-starter. Yet China continues to work toward rule by law and, statutorily, fiduciary duty, even as it doubles down both on state ownership and Party control across the spectrum of Chinese corporations. At the same time, and despite setbacks resulting from China's deteriorating relationship with the West and the Covid pandemic, the need for external capital and China's economic engagement with the world is unlikely to dissipate any time soon. Belt and Road, and China's turn toward western Asia and Africa notwithstanding, significant capital, at least for the foreseeable future, should flow from the West. To ensure its continuation, China is going to need to improve its corporate governance, and to prevent shocks to the system that scare off foreign investors like the cancellation of Ant Financial's IPO, the prohibition of online education, restrictions on game playing, and the virtual disappearance of Jack Ma, in order for western investors to have the confidence that they are investing with some reasonable degree of security.

As Milhaupt and Zheng point out, the problem is political, and political problems require political solutions. Given the historical and current state of affairs, as well as the increasing dominance of the Party-State's involvement in the corporate arena, such a solution must include Party-State accountability in the corporate realm.

As I earlier noted, the solution I suggest is stimulated by the fiduciary enforcement regime in American not-for-profits. The similarities in the two situations are immediately obvious. While not-for-profit directors are bound to the same fiduciary duties as their for-profit counterparts, nobody owns the not-for-profit. Nobody has a direct interest in its profits or assets. Nobody has much incentive to sue to enforce these duties, and therefore even the best-designed mechanism would be of little use. Consequently, state attorneys general – government actors -- are charged with the power to sue them in order to compel compliance with fiduciary duties and the disgorgement of illegal profits. Such suits both hold directors legally accountable for breach of their duties and create an environment in which the contours of fiduciary duty can be developed in the not-for-profit context.

Although China is very different from the U.S., this basic concept can be adapted to good effect by employing appropriate Chinese institutions. As I earlier noted, enforcement incentives and enforcement procedures are lacking, and the judiciary prefers to avoid dealing with the broad principle of fiduciary duty. (Note 60) None of these problems is likely to be solved in the foreseeable future and nothing in the 2021 Amendments is designed to fix them. (Note 61) So an alternative to private litigation must be sought.

I suggest a bureaucratic approach. The first problem that a bureaucratic approach can help to solve is interpretation. Legal interpretation through litigation is not a Chinese tradition. Bureaucratic administration is. (Note 62) As Lin Yutang put it in 1935: “A rigorous, harshly legalistic regime, or a really impersonal administration of the law, has always failed among us.... Instead of a government by law, they have always accepted a government by ‘gentlemen’ which is more personal, more flexible and more human.” In other words, a government by bureaucracy. (Note 63)

So as it was historically, so it is today. Chinese statutes are written broadly and ambiguously and judicial interpretation is quite limited, so part of every lawyer’s research requires discussing the meaning and enforcement practices applied to statutes with local bureaucrats. (Note 64) Judicial holdings simply cite a statute or series of statues “in accordance with” which the judgment is rendered without anything resembling common law application of law to the facts. In fact, at least in terms of compliance, bureaucracies fill some of the statutory and interpretive gaps filled by courts in common law countries. Using the bureaucracy as the lawyer of first resort, by drafting complaints and bringing lawsuits, can thus give greater definition to fiduciary duty, definition that would manifest in the kinds of lawsuits it brings. Bureaucratic interpretation would thus help courts in understanding fiduciary duty in the Chinese context and bureaucratic litigation success could serve to authorize and define private litigation for damages.

The second, perhaps more important, problem that a bureaucratic approach can solve is enforcement. Incentives for enforcement would no longer be lacking because enforcement would be the job of the bureaucracy, which would be charged with filing civil enforcement penalty suits much like attorneys general in the not-for-profit context. Penalties would be paid by fiduciaries to the company as in the standard derivative suit context, making private litigation unnecessary. To the extent the matter is one of direct injury to shareholders, damages as well as penalties could be paid to the bureaucracy in successful litigation, penalties to help fund the bureaucracy and damages for distribution to the shareholders, or could serve as authorization for private litigation for damages much in the way CSRC litigation does in the securities context and thus make meaningful the Company Law's provisions for compensation by bad actors. (Note 65)

As I have written elsewhere, it is more correct to think of MOEs (and, increasingly, private companies) as organs of the Party-State in terms of governance than it is to think of them in western terms, and I have suggested using anti-corruption law, a tool of the state, as a better enforcement mechanism than independent directors and fiduciary duties. (Note 66) The law has not agreed. So the new bureaucratic approach that I propose continues to develop this concept within Chinese law and institutions by locating the first line of fiduciary enforcement in the state, which can then serve as a tool for doctrinal development that can be used by the judiciary and a predicate for private litigation.

I recognize that such an approach would pit state against state, as prosecutions may conflict with Party-State interests. Here is where a political solution is ideal. To the extent there is legitimate policy conflict, my proposed system allows it to be addressed and resolved at the political level (as is currently the case with much of corporate policy). To the extent policy conflicts are illegitimate – controlling shareholder tunneling and the like—this mechanism largely serves as an anti-corruption device and thus is consistent with the Party's overall anti-corruption policy as well as the goal of continuing to attract foreign investment.

The solution I propose balances western-style accountability with the apparent needs and desires of the CCP by using its traditional bureaucratic approach but in a manner that I hope will catalyze the nation's evolution toward an economic realm that eventually is ruled by law. This approach should allow the bureaucracy to develop the contours of the law in a way that resembles the common law development of fiduciary duty currently absent in China, in which the bureaucracy forges a body of fiduciary law through effective interpretive and enforcement activities which over time is infused into the judicial system and the Chinese bar through the process of bureaucratic definition of appropriate cases and their enforcement litigation.

Placing the responsibility for doctrinal development and enforcement in a Party-State bureaucracy returns what is a private law approach to the political realm, which is more appropriate in the Chinese environment. The bureaucracy would be in a position to balance the interests of the state in controlling corporate behavior and its need for accountable corporate governance in a manner that private litigation simply cannot, and perhaps eventually overcome the judicial reluctance to take such cases because a body of developed law would clearly demonstrate (ideally, transparently), the contours of the Party's tolerance for such actions. It is even conceivable that the bureaucracy might eventually become redundant as Chinese corporate law develops, to be replaced by a body of developed enforceable judicial law.

The structure is relatively straightforward, even though it is accompanied by unavoidable costs. It is beyond my purview and my competence to assess whether the costs of such a structure are outweighed by the ultimate economic benefits, but the importance of a relatively efficient corporate structure in the

West is obvious for its well-being, and the (relatively recently) corporatized and foreign-facing structure of Chinese business clearly implies that this should also be true for China. While informed microanalysis is obviously necessary, my proposal seems to be conceptually sound, consistent with the problems identified in the literature, and suitable to unique Chinese circumstances.

This specialized fiduciary enforcement bureau primarily then would focus on the integrity and accountability of corporate fiduciaries, especially controlling shareholders, and indeed could be called something like “Article 21 Bureaus”. (Note 67) The starting point should be existing legislation, but the fiduciary and fiduciary-like characteristics could be studied comprehensively as an integral body of corporate accountability law instead of the article by article type of analysis engaged in by the civil law trained judiciary, a method that could open up Article 21 for effective enforcment.

So, to begin with the statute. Although the duties of directors and officers are concentrated in Articles 147 and 148 and those of controlling shareholders appear in Article 21, a comprehensive look at the Company Law reveals that it is infused with fiduciary and fiduciary-like duties.

My primary concern is with the duties of controlling shareholders so I shall begin with Article 21, quoted in full above. In American law, controlling shareholders have a duty of fairness to the minority in self-dealing transactions, a doctrine which is entirely common law –developed. (Note 68) Chinese Company Law begins with the unremarkable proposition that shareholders must be treated equally. But, as in US, where each class of shareholders must be treated equally, the target problems are dividends and liquidations. This dimension of the problem is less pronounced in China where there is not yet classification of shares, unlike in American law. The more significant problem is the tunneling of profits and assets beyond the formal distribution structure. (Note 69)

The package of fiduciary and fiduciary-like duties begins with Article 16, which requires a vote of the shareholders’ meeting to authorize a “guaranty to a shareholder or actual controller of the company” and prohibits the interested shareholder from voting while requiring a majority of the disinterested shareholders for approval. The pattern (which repeats in the corporate opportunity context, and now, at the board or shareholder level in the related transaction context) is familiar to American lawyers where fiduciary conflicts can be sanitized by the vote of a disinterested majority, although China lacks the residual requirement of fairness, which serves as a failsafe in American law. (None of the Chinese fiduciary-like provisions has a fairness requirement.) Article 20 provides for a sort of veil-piercing when creditors are injured by abuse of the corporate form but is broader by requiring damages for shareholders as well when other shareholders have abused the corporate form. (Note 70) Article 21, as noted above, provides for compensation when “the controlling shareholder, . . . the actual controller, [or] any of the directors, supervisors or senior management of the company . . . injure[s] the interests of the company by taking advantage of its connection relationship.” The breadth of this provision and the lack of judicial interpretation make it difficult to know what kinds of injury to the company are contemplated or the measurement of damages. It is also difficult to know quite what is meant by injuries due to “connection relationship[s].” Is, for example, asset tunneling the result of abusing a "connection relationship" where the practice is straight-forward self dealing? Is an overly-generous dividend policy abusive? Despite many uncertainties, the fiduciary thrust of the provision is clear. Controlling shareholders and actual controlling persons owe their loyalties to the company, not their friends. And, as I noted, content for those loyalties can already be found in Article 147 and 148 cases that appear to be vertical but in fact are horizontal.

Article 148, which is limited to directors and "senior managers," provides a list of seven specific actions that would broadly be prohibited under a duty of loyalty, with a catch-all provision prohibiting their breach of their obligation of fidelity, with the specific remedy to be disgorgement. Certain of these behaviors – related party transactions and corporate opportunities among them – can be sanitized by the approval of the shareholders' meeting, but the explicit requirement of disinterested shareholder approval that appears in Article 16 is missing. (Note 71) Article 151 provides for derivative litigation, but only for violations of Article 149 which sets forth a *Caremark* style duty of care, and Article 152 authorizes direct shareholder litigation for compensation for injuries from these care violations.

Taken together, the Company Law clearly means to infuse Chinese governance with a fiduciary aura. If one were to use common law methods of statutory interpretation, this discernable legislative intent could help these disparate provisions reinforce one another to develop something like a comprehensive fiduciary principle. But this, the Chinese courts will not do and likely cannot do, leaving each article as a kind of common law form of pleading without the ameliorating and gap-filling presence of principles of equity.

While the judiciary cannot be expected to fulfill this function, perhaps the bureaucracy can. After all, interpretation and application is the function of the bureaucracy, and Chinese lawyers must often check in with local bureaucrats to obtain their understandings of the law and their enforcement practices in order to have performed her research (Note 72)

So, without belaboring the point, a new bureaucracy may be well -suited to developing a body of fiduciary law and charged with its enforcement. Enforcement of course requires information. *Pace* Professor Howson, I do think it is impractical to expect this bureaucracy to serve as a first-level corporate monitor. But information regarding fiduciary misconduct could be funneled to it in several non-exclusive ways. One way is for the bureau to serve as a fiduciary complaint bureau, where shareholders who ordinarily would simply file suit or make demand on a board can file a formal complaint against a fiduciary with the bureau, which could then investigate the complaint (something to which bureaucrats are well-suited) and demand either voluntary corrective action or file a bureaucratic enforcement action. If bureaucratic enforcement is considered too cumbersome or expensive, bureaucratic investigation could be treated as a preliminary requirement to authorizing shareholders to bring private litigation, much in the same way that the demand requirement is used in derivative litigation. This latter approach would serve two purposes. One is to transfer the cost of enforcement (and the payment of damages) to the private sector. Second, and perhaps more important, it will signal to judges the fact that a given case has been pre-approved for litigation by the party and, if the bureaucracy fulfills the interpretive role I envision, provide the judiciary with theories of cases that come within the broad fiduciary fabric of the Company Law.

4. Conclusion

It is well-known that legal transplants often develop in new soil in ways different from their growth and application in their countries of origin. Culture, history, and institutional structure all affect the way that a law is applied and enforced. China's legal system is civil law with, as discussed in this paper, elements of Anglo-American law interpolated into that system. This alone would place the application of a classical common law concept like fiduciary duty in an unusual position.

But the application and enforcement of fiduciary duty in China also encounters a different problem. Fiduciary duty relies for its enforcement on a fully developed and highly skilled judiciary in a system in which law has historically been the dominant governing institution. It also depends on an independent judiciary. While the Chinese judiciary is rapidly developing, the judiciary itself is ensnared in bureaucracy and the Chinese system has historically depended on bureaucracy more than judicially-applied law for governance, a fact that remains apparent in Chinese practice. As matters now stand, Party dominance of MOEs will almost certainly continue to chill private enforcement of controlling shareholders' and senior management duties in such entities. If China is to develop a legal system appropriate to its culture and history, it seems to make sense for it to use the institutions with which it is most comfortable, even as it develops a new ways of implementing that system. In the West, law determines bureaucracy. Perhaps, in China, bureaucracy can help to determine law.

Notes

Note 1. Guangdong Xu, Tianshu Zhou, Bin Zeng and Jin Shi., Director's Duties in China, European Business Organization Law Review 14: 57-95 . Professor Clarke identified the institutional problems even before fiduciary duty was codified. Donald C. Clarke, Corporate Governance in China: An Overview, 14 China Economic Review 494-507 (2003). Nicholas Calcina Howson, however, discovers some real interpretive ability in the Shanghai judiciary. Nicholas Calcina Howson, Corporate Law in the Shanghai Peoples' Courts, 1992-2008: Judicial Autonomy in a Contemporary Authoritarian State, 5 East Asia L. Rev. 303 (2010) ("Howson, Shanghai").

Note 2. E.g., Guth v. Loft Inc., 5 A.2d 503, 23 Del. Ch. 255 (Del. 1939); Del, Gen. Corp. Law 144.

Note 3. Some scholars have referred to fiduciary duty in the Chinese context as a post facto remedy. While this is accurate on one level, Anglo-American fiduciary duty, at least as originally conceived, was considered to be a prophylactic measure, setting clear and understandable standards of conduct that ideally would prevent breach and litigation. I doubt it could serve this function well in the Chinese context. Ezra Wasserman Mitchell, Fiduciary Duty in a Guangxi Society, 8(2) J. Econ. & Pub. Fin. (2022).

Note 4. Xu, et al., supra. Howson is more optimistic about judicial competence. Howson, Shanghai, supra note 1; Nicholas Calcina Howson, The doctrine that dared not speak its name: Anglo-American fiduciary duties in China's 2005 company law and case law intimations of prior convergence, in HIDEKI KANDA, KON SIK-KIM, CURTIS MILHAUPT, EDS., TRANSFORMING CORPORATE GOVERNANCE IN EAST ASIA, pp. 193-254, London: Routledge, 2008 (hereinafter "Doctrine"). See also, Nicholas C. Howson, Fiduciary Principles in Chinese Law, in THE OXFORD HANDBOOK OF FIDUCIARY LAW, EVAN J. CRIDDLE, PAUL B. MILLER, AND ROBERT H. SITKOFF, EDS., pp. 603-622, Oxford, Oxford University Press, 2019; Howson, Doctrine, supra note 1; Nicholas C. Howson, Fiduciary Principles in Chinese Law, University of Michigan Law School Scholarship Repository, 2019, available at https://repository.law.umich.edu/book_chapters/197/

Note 5. Article 147. This is less problematic than appears with respect to these actors because Article 148 provides a detailed list of obligations that specify a number of misbehaviors that ordinarily would be captured by Anglo-American fiduciary duty. Article 124 provides a procedure similar but more ambiguous to Delaware 144 for related party transactions and Article 148(5) includes a corporate opportunity doctrine.

Note 6. Article 216(2) defines "controlling shareholder' as a shareholder who owns more than 50% of the company's equity or a shareholder who owns less than 50% "but who enjoys a voting right according to its capital contribution or the stocks it holds is large enough to impose an big impact upon the resolution of the shareholders' meeting or the shareholders' assembly."

Note 7. Article 21 of the 2021 Draft Amendments to the Company Law adds a new paragraph to Article 20 (which is the current Article 21), encompassing the harmful behavior of all shareholders rather than just controlling shareholders:

"Company shareholders shall comply with laws, administrative regulations and the articles of association, the exercise of shareholders' rights in accordance with the law, shall not abuse shareholders' rights to the detriment of the company or other shareholders; the company's shareholders abuse shareholders' rights to the company or other shareholders causing damage, shall bear the responsibility for compensation."

Note 8. Curtis J. Milhaupt and Wentong Zheng, Beyond Ownership: State Capitalism and the Chinese Firm, 103 Georgetown Law Journal, 665(2015); Curtis J. Milhaupt and Wentong Zheng, Why Mixed Ownership Reforms Cannot Fix China's State Sector, Paulson Policy Memorandum, available at https://www.paulsoninstitute.org/wp-content/uploads/2017/01/PPM_SOE-Ownership_Milhaupt-and-Zheng_English_R.pdfhttps://www.paulsoninstitute.org/wp-content/uploads/2017/01/PPM_SOE-Ownership_Milhaupt-and-Zheng_English_R.pdf (January 2016). Mork and Yeung convincingly demonstrate the governmental nature of the Chinese firm. Randall Morck and Bernard Yeung, Corporate Governance in China, 26 Applied Corporate Finance No. 3 (Summer 2014).

Note 9. Howson has been optimistic. Nicholas Calcina Howson, The doctrine that dared not speak its name: Anglo-American fiduciary duties in China's 2005 company law and case law intimations of prior convergence, in HIDEKI KANDA, KON SIK-KIM, CURTIS MILHAUPT, EDS., TRANSFORMING

CORPORATE GOVERNANCE IN EAST ASIA, pp. 193-254, London:Routledge, 2008 (hereinafter "Doctrine"); Howson, Shanghai, supra note 4.

Note 10. Daisuke Wakabayashi, Chang Che, and Claire Fu, In Xi's China, the Business of Business is State-Controlled, The New York Times, October 17, 2022, available at https://www.nytimes.com/2022/10/17/business/china-xi-jinping-business-economy.html.

Note 11. Estimates of the economic contribution of SOEs vary to as high as 30% or slightly higher. According to a 2019 World Bank report, SOEs contributed between 23% and 28%. Zhang Chunlin, How Much do State-Owned Enterprises Contribute to China's GDP and Employment?, Washington, D.C., World Bank Group, http://documents.worldbank.org/curated/en/449701565248091726/How-Much-Do-State-Owned-Enterprises-Contribute-to-China-s-GDP-and-Employment (July 2019). It is worth pondering whether the current strong emphasis on state ownership and control and prioritization of Chinese over foreign companies might dry up foreign investment to a point at which foreign investor concerns about corporate governance could become relatively unimportant, at least for the foreseeable future.

Note 12. The draft revisions make China's corporate governance system look even more like American-style corporate governance.

Note 13. The Irreparable Failure of Independent Directors and Boards of Directors in Chinese Listed State Owned Enterprises 3 International Business and Economics Studies (March 23, 2021), available at http://www.scholink.org/ojs/index.php/ibes/article/view/3818

The proposed amendments to the Company Law go a long way toward strengthening the role of the board, even in wholly state-owned companies, at the same time that they emphasize the Communist Party's supervisory role. 2021 Draft Amendments, Articles 149,145.

Note 14. Milhaupt and Zheng, supra note 8.

Note 15. Wasserman Mitchell, supra note 13 and note 3. Article 21 directly addresses the misuse of guanxi. The Article uses the Chinese characters 关联 关系 (guanlian guanxi) which literally translates to "connection relationship." 关系 (guanxi) means a personal relationship. It would appear that the scope of Article 21 is then broader than guanxi alone would imply and include connections in which the personal dimension is lacking or relatively unimportant.

Note 16. Others have noted the cultural problem. See, e.g., Lay Hong Tan and Jiangyu Wang, Modeling an Effective Corporate Governance System for China's Listed State-Owned Enterprises: Issues and Challenges in a Transitional Economy, 7 Journal of Corporate Law Studies 1 (2007).

Note 17. China's Company Law also includes a "duty of care." The courts have been reluctant to enforce it, or at least have treated it as very weak protection, sometimes giving reasons similar to those that support the American business judgment rule.

Note 18. https://www.wilmerhale.com/en/insights/client-alerts/20220118-china-publishes-draft-amendment-to-company-law.

Note 19. In light of the significant political constraints on Chinese corporations one can wonder whether flexible corporate governance mechanisms will actually emerge.

Note 20. Xu, et al. supra note 1, point out that, prior to 2005, judicial remedies consisted of injunctions rather than disgorgement or damages, but that the law still provides quite limited procedures for the awarding of damages. P. 74. As I will show in Part II, damages awards have become quite common in the Shanghai courts. Zhang argues for American-style contingency fees. Zhong Zhang, Making Shareholder Derivative Actions Happen in China: How Should Lawsuits be Funded?, 38 Hong Kong L. J. 523 (2008).

Note 21. Howson, Shanghai, supra note 1 at 69, 72.

Note 22. Xu, et al., supra note 1.

Note 23. The Chinese Securities Law says nothing about fiduciary duties, athough the CSRC rules and regulations do. Xu, et. al, supra note 1, at 8.

Note 24. Fuxiu Jiang, Kenneth A Kim, Corporate Governance in China: A Survey, Review of Finance, 2020, 733-772.

Note 25. Jiangyu Wang, The Political Logic of Corporate Governance in Chinese State-owned Enterprises, 47b Cornell Int'l L. J. Issue 3, Article 5 (2014). Wang analyzes the political structure of MOEs. The assertion that Chinese corporate law is really public law is mine, although it is the clear conclusion to be drawn from Wang's work, although Wang presents the situation as power-based rather than law-based. Id. at 648. It is my goal to use bureaucratic power to develop the law.

Note 26. Howson appears to think that bureaucratic enforcement is impractical. Howson, Fiduciary Principles, supra note 4 at 621. I disagree. The CSRC already pays an enforcement role with respect to listed companies and within the scope of its mandate, although it is not yet effective. Xu, supra note 1. And I see no other way that is both conceptually coherent and, as I shall argue, practical.

Note 27. My research has focused on Shanghai, where private company enforcement seems to be developing. Later research will expand to the rest of China where I do not expect the same results (although perhaps they will be similar I other Tier I cities). I do not address wholly-owned SOEs which simply are corporatized organs of the Party-state.

Note 28. See generally Eileen L. Morrison, Enforcing the Duties of Non-Profit Fiduciaries: Advocating for Expanded Standing for Beneficiaries, 95 B.U. L. Rev Annex 1 (1999). Members and others can also bring suit in some instances but the incentives to bring such suits are highly limited. See New York Not-For-Profit Corporation Law Section 720.

Note 29. While procedural fairness has, to a significant extent, supplanted substantive fairness in American law, fairness always remains the touchstone. Lawrence E. Mitchell, Fairness and Trust in Corporate Law 43 Duke Law Journal 425 (1993).

Note 30. See my translation note, supra note 5.

Note 31. Howson, Fiduciary Principles, supra note 4; Nicholas C. Howson, Fiduciary Principles in Chinese Law, University of Michigan Law School Scholarship Repository, 2019, available at https://repository.law.umich.edu/book_chapters/197/ (with respect to fiduciary duty);Donald C. Clarke and Nicholas C. Howson, Pathway to Minority Shareholder Protection, Derivative Actions in the People's Republic of China, in THE DERIVATIVE ACTION IN ASIA, DAN W. PUCHNIAK, HARALD BAUM, AND MICHAEL EWING CHOW, EDS., CAMBRIDGE, 2011; Xu, et. al., supra note 1 are less optimistic than Howson.

Note 32. Teemu Ruskola has shown the evolution of Chinese businesses from family concerns. Teemu Ruskola, Conceptualizing Corporations and Kinship: Comparative Law and Development Theory in a Chinese Perspective, 52 Stan. L. Rev. 1599 (2000).

Note 33. It is difficult to imagine common law adjudication without the ability to rely on precedent and the reasoning of other courts so I assume that what Howson means by the analogy is the use of common law-type reasoning by Chinese judges. Howson, Fiduciary Principles, supra note 4, at 616, acknowledges the failure to rely on precedent as a problem for the evolution of fiduciary duty. Howson himself doubts the need for a common law system to enforce fiduciary duties based on China's success thus far. Id., at 621-22.

Note 34. Xu, supra note 1. Howson traces back some of the pre-2005 introduction of fiduciary duty itself to the CSRC. Howson, Doctrine, supra note 4. The Guidelines of the CRSC for the Articles of Association for Listed Companies specifically establish a duty of loyalty (Article 97) and a duty of diligence (Article 98) with the latter requiring fairness for all shareholders.

Note 35. Xu, et al., supra note 1 at 61.

Note 36. Xu, et al., supra note 1 at 65-66.

Note 37. Id. at 69.

Note 38. Id. at 73.

Note 39. Id. at 80.

Note 40. A controlling shareholder has options other than tunneling. See e.g. Jianan Guo, Ultimate Controlling Shareholders and Dividend Payout Policy In Chinese Stock Market 19 Review of Pacific Basin Financial Markets and Policies, No. 2 (2016); Douglas DeJong and Ke Liao, Controlling Shareholder's Share Pledging and Accounting Manipulations, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3274388.

Note 41. Gong-meng Chen Michael Firth, Ning Daniel Gao, and Oliver M. Rui, Do Ownership Structure and Governance Mechanisms Have an Effect on Corporate Fraud in China's Listed Firms?, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=728945. Such problems could also characterize the bureaucracy I propose.

Note 42. Xu et al., supra note 1 at 84.

Note 43. Note, Chinese Common Law? Guiding Cases and Judicial Reform, 129 Harv. L. Rev. 2213 (2016).

Note 44. Mitchell, Fairness and Trust, supra note 29.

Note 45. Xu et al., supra note 1. Howson also notes that none of the early fiduciary duty cases were brought against fiduciaries of listed companies. He notes that most cases are brought against LLCs or closely held corporations and a "strict ban" on suing fiduciaries in widely-held and listed companies. Howson, Fiduciary Principles, supra note 4 at 618.

Note 46. Jiangyu Wang, The State as Controlling Shareholder in Chinese State-Owned Enterprises: China Unicom's Mixed Ownership Reform and the Possible Emergence of a 'Consultative Corporate Governance Model, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3249333 (2018); Milhaupt and Zheng, supra note 8.

Note 47. Wang, Political Logic, supra note 46 at 47.

Noet 48. Milhaupt and Zheng, supra note 8. Their analysis shows that the state tends to exercise less control in state-owned enterprises than is generally supposed and more influence than would be expected in privately-owned companies.

Note 49. JAMES C. BONBRIGHT AND GARDINER C. MEANS, THE HOLDING COMPANY (1932).

Note 50. Although wholly-owned subsidiaries of SOEs can be fair game. See Shanghai Zhongmao Industrial Co., Ltd. and Shanghai Petrochemical Group South Wing Petrochemical Co., Ltd. and Sinopec Sales Corporation Shanghai Petroleum Branch, Inc. The case involved a wholly-owned subsidiary of Sinopec, a listed SOE. The court found no liability based on a lack of evidence by the plaintiff. Shanghai Jinshan District People's Court

Civil Judgment No. (2020) Shanghai 0116 Civil No. 13861 The search was performed on pklaw.com.

Note 51. The large number of cases dealing with misappropriation and corporate opportunity often involve diversion to relatives, thus supporting my previous argument as to the expected inefficacy of the prophylactic effect of fiduciary duty in a society dominated by guanxi, although further research needs to be done to demonstrate this. Mitchell, Guanxi, supra note 3.

Note 52. I read 50 cases citing Article 147 and 148, and 30 cases citing Article 21, decided between 2016 and 2022. A list of cases is available from the author.

Note 53. Shanghai Zhenghu Logistics Co. v. Liu Jianhua, (2016) Shanghai 0116 Civil No. 1164, Shanghai Jinshan People's Court.

Note 54. Zhou Yu et. al. v. Shi Tang Corporation Interest Liability Dispute, Shanghai First Intermediate People's Court (2016) Shanghai 01 Civil Final No. 13372.

Note 55. Shanghai Second Intermediate People's Court (2019) Shanghai 02 Civil Final No. 11313.

Note 56. That said, the rapid drop-off in cases may return us to the situation observed in the earlier literature, that fiduciary duty is rarely enforced. If so, it would simply strengthen the utility of my proposal.

Note 57. Company Law of China, Article 148.

Note 58. 2021 Draft Revisions Articles 183,184.

Note 59. Lawrence E. Mitchell, The Death of Fiduciary Duty in Close Corporations 138 University of Pennsylvania Law Review 1675 (1990).

Note 60. Howson notes how, in the 1992-2008 period, the Shanghai courts “strive to avoid corporate fiduciary duties doctrine . ...” Howson, Shanghai, supra note 1 at 65.

Note 61. The failure of fiduciary duty to flourish in China, even by failing to adapt to different a culture and institutions as do many legal transplants throughout the world, might be seen as a form of institutional resistance. That is, the nature of the culture and institutions are such that the transplant is strangled before it can take root enough to be adapted. As Howson has shown us, the problem is not Chinese judges, who seem to be fully capable of understanding and applying fiduciary duty. Howson, Shanghai, supra note 1. Rather, it is the embeddeness of the judiciary within China’s political, bureaucratic, and cultural structures that prevent judges from realizing this potential. There is no reason to believe that this situation will change in the foreseeable future, and indeed recent political events in China suggestion that the bureaucracy may become even more overwhelming of western-style legal insitutions.

Note 62. Xu, et. al., supra note 1 at 81-82. As Tan and Wang, proposing a Singapore-like holding company structure for Chinese corporate governance, observed in 2007, “the political-cultural traditions of contemporary China demands [sic) that the system of governance of listed SOEs remains within the concept of a monolithic and all-powerful bureaucratic hierarchy.” Tan and Wang, supra note 16 at 30. In somewhat related recent work, Ma, Cheng, and He find that higher level courts have repressed China’s administrative courts, in particular railway transit courts. Chao Ma, Chao-Yo Cheng, and Haibo He, From Local to Upper Capture: The Chinese Experiment of Administrative Courts, 22 The China Review 9 (2022).

Note 63. LIN YUTANG, MY COUNTRY AND MY PEOPLE (1935), 156-57. Lin also believed that China was a fertield ground for communism (without Russian ideology). Id., at 239.

Howson also analyzes the bureaucratic embeddedness of the Chinese judiciary. Howson, Shanghai, supra note 1 at 61.

Note 64. Guiding opinions may become the exception. See Note, Chinese Common Law?: Guiding Cases and Judicial Reform, 129 Harvard L. Rev. 2213 (2016).

Note 65. Of course there will be agency costs. But it is idle to prioritizing the reduction of agency costs in the absence of any workable enforcement mechanism. After all, Americans only started to worry about agency costs after the machinery of corporate governance was already well developed.

Note 66. Wasserman Mitchell, Irreparable, supra note 13.

Note 67. I have argued elsewhere that corporate accountability in China would be more effective if treated as a variety of anti-corruption law than as western-style private corporate law.

Note 68. Mitchell, Fairness and Trust, supra note 29.

Note 69.The 2021 Draft Revisions provide for the classification of shares. Article 157. This has the potential to exacerbate tunneling. MEANS, THE HOLDING COMPANY, supra note 49.

Note 70. I say “sort of” because the Chinese law provides for the payment of damages rather than a pierce-through to the shareholder’s personal assets. This may be a difference without a distinction. It is interesting to note this preservation of formal personhood despite the Party's pervasive internal influence.

Note 71. The codification of related party transactions in the 2021 Draft Revisions explicitly provides that the interested director's vote is not to be counted for board approval purposes. Article 183. The same requirement is not present for board rejection of a corporate opportunity. Article 184.

Note 72. I know this first-hand after three years of consulting at a Shanghai law firm. And one must assume that what is practice in Shanghai is almost certainly more so in cities and regions with less sophisticated bars.